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No.

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In the Supreme Court of the United States

October Term, 1985

LANE McCOTTER,
Petitioner,
vs.
PEDRO CRUZ MUNIZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Should this Court's decision in *Estelle v. Smith,* 451 U.S. 454 (1981), be retroactively applied to overturn convictions final before the date of that decision?

II.

During the punishment phase of Respondent's capital murder trial, was the admission of psychiatrist's testimony regarding Respondent's future dangerousness harmless error?

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No.

In the Supreme Court of the United States

October Term, 1985

LANE McCOTTER,
Petitioner,

vs.

PEDRO CRUZ MUNIZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 9, 1985. Motion for leave to file petition for rehearing was denied on June 21, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix as *Muniz v. Procunier*, No. 84-1791 (5th Cir. May 9, 1985). No opinion was rendered by the Court of Appeals upon its denial of Petitioner's motion for leave to file petition for rehearing. A copy of the denial appears in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit reversing the denial of the Respondent's application for writ of habeas corpus entered by the United States District Court for the Western District of Texas, Austin Division, and remanding the cause to the district court with directions to grant relief was entered on May 9, 1985. Petitioner's motion for leave to file petition for rehearing was denied on June 21, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Proceedings in the Trial Court

On January 12, 1977, Pedro Cruz Muniz was indicted for the offense of capital murder. A jury found Respondent guilty of the offense and answered yes to each special issue submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981). Punishment was assessed at death.

The record reflects that Respondent brutally raped and murdered Janis Lynn Bickham, a 19 year old coed from Southwestern University. On December 22, 1976, in the vicinity of the San Gabriel River Bridge in Georgetown, Texas, the nude body of Bickham was discovered. The body was found covered by wood and debris. The autopsy revealed four blunt lacerations of the top and back of the head, resulting in the crushing of the skull, a broken jaw, bruises behind each ear, and bruises on the forehead over each eye, for a total of nine impact points to the face and head. The victim's brain was swollen and hemorrhaging. The victim's hymenal ring was overstretched, with the hymen being dilated, stretched and torn downward to the left. Sperm was detected in her vagina. Defense type bruises were detected on the victim's hands and forearms. Scrape and drag marks covered the front and back of the body. Cause of death was established as a fractured skull in association with forcible

rape. The coroner determined that the vaginal injuries occurred at or about the same time as the injuries which caused the victim's death.

At approximately 7:00 p.m. on the evening of the murder, George Hartado was leaving the park near the river bridge when he saw a redhaired woman in a purple coat walking across the bridge closely followed by a man he recognized as Respondent.

At approximately 9:00 p.m. on the evening of the murder, Respondent approached an automobile occupied by Larry Drake, Herbert Jackson and Herbert Gonzalez. Respondent was wearing a T-shirt with a stain on it, he had a scratch or knot on his face, one of his hands was swollen, and he was breathing hard, as if scared. They gave Respondent a ride to his house.

On December 20, 1976, Respondent, his brother, Leonard, and his cousin, Joe Cruz, were playing pool and drinking beer at several locations. That evening, they went to the house of Cruz's uncle, located near the bridge, to borrow some money. Cruz and Leonard Muniz went in the house for approximately 20-25 minutes. When they came out, Respondent was gone. Cruz did not see Respondent until noon the next day, at which time he noticed a knot on Respondent's forehead.

Respondent was arrested on December 23, 1976, at his brother's home. Respondent was found hiding in a closet. Respondent was advised of his *Miranda* rights by the arresting officer. He was then taken before a Justice of the Peace where he was informed at 12:50 a.m. of the nature of the charge, his right to counsel, his right to an examining trial, and his right to remain silent. Respondent acknowledged these rights by signing a document detailing the rights. Respondent was again informed

of his *Miranda* rights at 1:45 a.m. Respondent declined to exercise any of these rights. At approximately 11:00 a.m., Respondent was read his *Miranda* rights by Georgetown Police Chief Travis Thomas. Thirty minutes later, he was apprised of his *Miranda* rights by Officer William Shirley. Respondent then gave a written statement. Appendix p. A7.

Respondent was interviewed on March 7, 1977, by Dr. John Holbrook, a psychiatrist acting at the behest of the prosecutor. The state court record is silent as to whether Dr. Holbrook advised Respondent of his *Miranda* rights or whether Respondent's counsel had been informed in advance that Dr. Holbrook would interview Respondent.

On June 17, 1977, Dr. Holbrook's report was prepared. Appendix p. A9. The report was provided to defense counsel on June 23, 1977. Dr. Holbrook was called to testify on July 20, 1977, at the punishment phase of Respondent's trial. He stated that he examined Respondent for the purpose of determining his sanity at the time of the offense, at the time of the examination and at the time of trial, as well as his competence to assist in his own defense. It was his opinion that Respondent was sane and competent at all relevant times. Based upon his examination of Respondent, Dr. Holbrook diagnosed Respondent as an antisocial personality. The prosecutor then posed a hypothetical question, which closely paralleled the facts proven at the guilt-innocence phase of trial, and asked to what degree of antisocial personality Respondent belonged. Dr. Holbrook responded that the degree of antisocial behavior was severe. Dr. Holbrook further testified that, based upon the facts of the offense, his examination of Respondent and his own experience, there was a high probability that Respondent would be a continuing danger to society. Counsel's only objections to Dr. Hol-

brook's testimony were that it was speculative, conjectural, irrelevant and leading.

Appellate Proceedings

Respondent's conviction was affirmed by the Texas Court of Criminal Appeals on November 1, 1978. *Muniz v. State,* 573 S.W.2d 792 (Tex. Crim. App. 1978), *cert. denied,* 442 U.S. 924 (1979). On July 27, 1979, the trial court issued a warrant of execution. Thereafter, Respondent filed an application for stay of execution and a petition for writ of habeas corpus which was denied by the Texas Court of Criminal Appeals. *Ex parte Muniz,* No. 8378 (Tex. Crim. App. Sept. 6, 1979).

Respondent filed an application for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, Austin Division, on September 7, 1979. A stay of execution was entered by the district court and further proceedings were abated pending the Court of Appeals' decision in *Smith v. Estelle. Smith v. Estelle,* 602 F.2d 694 (5th Cir. 1979). The United States Supreme Court decided *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) on May 18, 1981. The district court denied Respondent's application for writ of habeas corpus on July 30, 1984. Appendix p. A13.

On May 9, 1985, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court denying the writ of habeas corpus and remanded the case to the district court with directions to grant relief. *Muniz v. Procunier,* No. 84-1791 (5th Cir. May 9, 1985). Appendix p. A1. Petitioner's motions for recall and stay of issuance of mandate and for leave to file petition for rehearing were denied on June 21, 1985. Appendix p. A6.

REASONS FOR GRANTING THE WRIT

I.

This Court has never decided whether *Estelle v. Smith* should be prospectively or retroactively applied. The decision of this Court in *Solem v. Stumes* compels only prospective application of *Estelle v. Smith*. The action of the United States Court of Appeals for the Fifth Circuit applying *Estelle v. Smith* retroactively is erroneous and should be reviewed.

In light of this Court's decision in *Solem v. Stumes*, 465 U.S. ....., 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), Petitioner believes that *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), should not be applied retroactively to cases in which a conviction is being collaterally attacked. In *Stumes* it was held that *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should not be applied retroactively. *Edwards* held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him since an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. In *Smith*, another Fifth Amendment decision, the Court held that where a defendant was not advised before a pre-trial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at the sentencing proceeding, the admission of the psychiatrist's testimony at that proceeding violated the defendant's Fifth Amendment privilege against compelled self-incrimination. The Court further held that admission of the psychiatrist's testimony violated the defendant's Sixth Amendment right to assistance of counsel in deciding whether to submit to the examination and to what end the psychiatrist's find-

ings could be employed. Thus, the *Edwards* and *Smith* decisions implicate similar constitutional rights.

The analysis of this Court in *Stumes* should be used to determine whether *Smith* is retroactive. *Stumes* held that the criteria guiding resolution of whether a judicial decision should be applied retroactively are 1) the purpose to be served by the new standards, 2) the extent law enforcement authorities relied on the old standards, and 3) the effect on the administration of justice of a retroactive application of the new standards. Applying *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), the Court of Appeals refused to address the issue of retroactivity in light of *Stumes*. However, the *Stumes* analysis, when applied to *Smith*, compels non-retroactive application with even greater force than in *Edwards*.

Purpose of New Standard

"Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Stumes*, 104 S.Ct. at 1342. In addition, this Court noted that the "*Edwards* rule has only a tangential relation to truth finding at the trial." *Stumes*, 104 S.Ct. at 1342. The request for a lawyer by an accused does not mean that his subsequent statements are likely to be inaccurate. Similarly, the fact that an accused was not warned by the examining psychiatrist that his statements might be used to prove future dangerousness does not make those statements any less accurate.

Miranda itself was not applied retroactively to trials taking place before it was decided. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 2602, 16 L.Ed.2d 694 (1966); *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Whether a constitutional rule of criminal pro-

cedure enhances the reliability of the fact finding process at trial is a matter of degree. In *Stumes* and *Johnson* it was noted that pre-Miranda law would still protect an accused from being convicted by use of coerced confessions. The same should be true in coerced statements made to a psychiatrist.

Miranda can be no less important to enhancing accuracy than *Smith,* and *Miranda* is not retroactive. Since *Smith* flows from *Miranda* it can also be regarded as "a prophylactic rule, designed to implement pre-existing rights" and should not be applied retroactively. *Stumes,* 104 S.Ct. at 1343. See also, *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

Extent of Reliance

In *Stumes* this Court stated that when past precedent was expressly overruled, a practice sanctioned in prior cases was disapproved, or a longstanding practice approved by near unanimous lower-court authority was overturned, "the reliance and effect factors in themselves 'have virtually compelled a finding of non-retroactivity.' " *Stumes,* 104 S.Ct. at 1343, citing *United States v. Johnson,* 457 U.S. 537, 549-550, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). However, *Edwards* did not establish a new substantive requirement. Rather, the decision established a new test for waiver of right to counsel once that right has been invoked. This Court recognized in *Stumes* that a new application of existing principles may establish a new principle of law even though it did not overrule any prior decision or transform standard practice. Therefore, the Court of Appeals statement in *Battie* that "[o]nly a decision which established a new principle of law need be considered for prospective application is patently erroneous." *Battie,* 655 F.2d at 697.

Critical to the determination of whether a new rule has been created by the novel application of a pre-existing rule was the state of law in the lower courts and law enforcement's reliance on the prior rule of law. *Estelle v. Smith* radically changed the law in Texas. Prior to *Smith*, the Texas Court of Criminal Appeals consistently rejected Fifth and Sixth Amendment claims that a court appointed psychiarist must warn a defendant of his right to remain silent, that evidence adduced in a psychiatric evaluation could be used against him, and that a defendant is entitled to counsel prior to psychiatric examination. *Wilder v. State*, 583 S.W.2d 349 (Tex. Crim. App. 1979), *vacated*, 451 U.S. 902 (1981), *aff'd*, 623 S.W.2d 650 (Tex. Crim. App. 1981); *Von Byrd v. State*, 569 S.W.2d 883 (Tex. Crim. App. 1978), *cert. denied*, 441 U.S. 967 (1979); *Shippy v. State*, 556 S.W.2d 246 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 935 (1977); *Livingston v. State*, 542 S.W.2d 655 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Armstrong v. State*, 502 S.W.2d 731 (Tex. Crim. App. 1974); *Stultz v. State*, 500 S.W.2d 853 (Tex. Crim. App. 1973); *Blankenship v. State*, 432 S.W.2d 945 (Tex. Crim. App. 1968). Until *Smith* there was no judicial voice to the contrary in Texas. *See Fields v. State*, 627 S.W.2d 714, 722-27 (Tex. Crim. App. 1982), *cert. denied*, 459 U.S. 841 (1982) (McCormick, J., concurring), and *Ex parte Chambers*, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984) (Campbell, J., concurring).

In *Battie*, the Court of Appeals held that *Smith* merely applied fixed principles to a new factual situation. Retroactivity was based upon this premise. *Battie* fails to recognize that *Smith* created a novel application of pre-existing law. Further, the *Battie* Court never considered the element of reliance in its determination of *Smith* retroactivity.

As in *Edwards*, the State was entitled to rely on the decisions of their highest court. *Battie v. Estelle* should be overruled. Petitioner asserts that the decision in *Smith* was not clearly or distinctly foreshadowed and that the magnitude of the reliance interest compels a finding of non-retroactivity.

Effect on Administration of Justice

The retroactive application of *Smith* would have a disruptive effect on the administration of justice. Investigation and possible retrial of capital cases tried prior to 1981 would be severely hampered by problems of lost evidence, faulty memory, and missing witnesses. See *Stumes*, 104 S.Ct. at 1345. The detrimental effect of retroactive application would be substantial because the use of psychiatric testimony in capital cases regarding future dangerousness prior to *Smith* was widespread. In fact the federal district court noted in *Smith v. Estelle*, 445 F.Supp. 647, 653 n.7 (N.D. Tex. 1977), that one Texas psychiatrist alone has testified in several hundred cases.

Petitioner is also aware that petition for writ of certiorari in *Texas v. Chambers*, No. 84-1850, is currently pending before this Court. In addition, *Jones v. Procunier*, No. 84-1401, is pending before the Fifth Circuit. In both cases the retroactive application of *Estelle v. Smith* is at issue.

Under Texas law, a contemporaneous objection is no longer necessary to preserve *Smith* error, even though the trial occurred prior to the decision in *Smith*. *Ex parte Chambers*, 688 S.W.2d 483 (Tex. Crim. App. 1984). Therefore, it is conceivable that numerous applications for writ of habeas corpus raising *Smith* error will follow. Petitioner advances that complete retroactivity of *Smith* is unnecessary to advance the purposes of habeas corpus. See *Stumes*, 104 S.Ct. at 1348-49 (Powell, J., concurring).

The disruptive effect on the administration of justice clearly favors non-retroactive application of *Smith*.

Summary

It is clear that the criteria reiterated in *Stumes* when applied to *Smith* mandate a prospective application only. At the very least, *Smith* should not be applied in collateral attacks on convictions in which direct appeal was exhausted long before *Smith* itself was decided. Since this Court has never ruled on the retroactivity of *Smith* it should do so now.

II.

In *United States v. Hastings*, 461 U.S. 499, 103 S.Ct. 1974, 1981 n.7, 76 L.Ed.2d 96 (1983), this Court held that consideration of the entire record was mandated prior to reversal of a conviction for constitutional errors that may be harmless. Although Fifth and Sixth Amendment violations occurred, per se reversal should not follow where the testimony of the psychiatrist regarding future dangerousness when viewed in conjunction with the record as a whole did not contribute to the assessment of the death penalty.

In *Harrington v. California*, 395 U.S. 290, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), this Court stated that overwhelming evidence of guilt may permit constitutional error to be harmless. Moreover, error resulting from the admission of evidence obtained in violation of the Fifth and Sixth Amendments has been held to be harmless. *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). See also, *United States v. Ledezma-Hernandez*, 729 F.2d 310 (5th Cir. 1984); *Hall v. Iowa*, 705 F.2d 283 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 339 (1983); *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983); *United States v. Hayles*, 471 F.2d 788 (5th Cir. 1973), *cert. denied*,

411 U.S. 969 (1973). The Texas Court of Criminal Appeals has applied the harmless error rule to *Smith* error. *Vanderbilt v. State*, 629 S.W.2d 709 (Tex. Crim. App. 1981); *Sanne v. State*, 609 S.W.2d 762 (Tex. Crim. App. 1980). Contra, *White v. Estelle*, 720 F.2d 415 (5th Cir. 1983).

Petitioner believes that the error in the admission of evidence regarding future dangerousness is harmless beyond a reasonable doubt because other evidence which was presented to the jury on the issue is overwhelming. Further, the circumstances surrounding the admission of the complained of testimony are not as egregious as those found in *Smith*.

In addition to the psychiatrist's opinion as to future dangerousness, the State re-offered the evidence adduced during guilt-innocence, three witnesses testified that Respondent's reputation as a peaceful and law-abiding citizen was bad, and evidence concerning Respondent's prior convictions for the offenses of resisting arrest and escape were introduced at the punishment phase of the trial.

The sentencing procedure in a capital case requires the jury to answer two and possibly three special issues. TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981). The second special issue requires the jury to determine whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The circumstances of the offense, if particularly heinous, can sustain an affirmative answer to special issue number two. *Mitchell v. State*, 650 S.W.2d 801, 812 (Tex. Crim. App. 1983), *cert. denied*, 104 S.Ct. 985 (1984). The facts in Respondent's case reveal the random, brutal, and merciless killing and rape of a young woman. These circumstances alone indicate that it is more probable than not that Respondent is a continuing threat to society. Moreover, when the evidence re-

garding Respondent's bad reputation and his prior criminal conduct is viewed in conjunction with the facts of the crime, the evidence is overwhelming as to the probability of Respondent's future dangerousness. See *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) where similar reputation evidence was probative of future dangerousness.

The circumstances surrounding the admission of the complained of evidence are not as egregious as those in *Smith*. Respondent's counsel filed a motion for discovery requesting disclosure of psychiatric reports. Respondent received Dr. Holbrook's report prior to trial. Dr. Holbrook testified that the offense was not discussed during the examination. Rather, the discussions were peripheral to the offense. The prosecutor asked Dr. Holbrook's opinion as to Respondent's future dangerousness based upon a hypothetical question as well as the examination. Respondent's counsel conducted an effective cross-examination of Dr. Holbrook and the doctor admitted that his opinion regarding future dangerousness was a judgment call and that other physicians might reach contrary results. Thus, the harm resulting from the admission of the improper psychiatric testimony was mitigated.

The district court in its opinion, made a distinction "between violations of constitutional rights which themselves influence a trial and the admission of evidence obtained in violation of constitutional rights." Appendix p. A20-21. The violation in Respondent's case is of the latter type. Even though there was a constitutional violation, no error occurred until the psychiatrist's opinion based upon the examination was admitted. Petitioner recognizes that the psychiatric examination of Respondent subsequently became a critical stage. *Smith*, 451 U.S. at 470. In a capital case, reversal has been deemed automatic

where the defendant is deprived of the presence and assistance of counsel. *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) and cases cited therein. However, *Holloway,* involved representation by counsel of multiple defendants with conflicting interests. The violation in *Holloway* directly influenced the trial. Based upon this distinction, reversal on Sixth Amendment grounds should not be automatic.

Petitioner asserts that the error resulting from the admission of the psychiatrist's testimony regarding future dangerousness was harmless for the foregoing reasons. The possibility that the complained of evidence contributed to the assessment of the death penalty is not reasonable in light of the overwhelming evidence that the Respondent would probably commit criminal acts of violence that would constitute a continuing threat to society.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: July 25th, 1985

CERTIFICATE OF SERVICE

I, MICHAEL PATRICK DAVIS, as Counsel of Record for Petitioner and a member of the Bar of the Supreme Court of the United States of America, hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari have been served upon JESSIE ROY BOTELLO, Esq., 515 South Main Avenue, San Antonio, Texas 78204, in accordance with Rule 33 of the Supreme Court Rules, by placing such copies in the United States Mail. All Parties required to be served have been served.

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APPENDIX

(Filed May 9, 1985)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1791

PEDRO CRUZ MUNIZ,
Petitioner-Appellant,

versus

RAYMOND K. PROCUNIER, Director of Texas Department of Corrections,
Respondent-Appellee.

Appeal From the United States District Court
for the Western District of Texas

(May 9, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

On December 20, 1976 Pedro Cruz Muniz brutally raped and murdered a 19 year old college student. In 1977 he was tried in Williamson County, Texas, convicted, and

sentenced to death. The Texas Court of Criminal Appeals affirmed in 1978, *Muniz v. State,* 573 S.W.2d 792, and the Supreme Court denied certiorari, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 291 (1979). The state court then denied a collateral attack upon the sentence in 1979. Muniz sought federal relief by this suit filed in 1979. The district court denied it in 1984.

I.

[2] The issue here is whether Muniz is entitled to relief from his death sentence because of *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In that case the Court, affirming this circuit and the district court, held that both the Fifth and Sixth Amendments are violated by a doctor's testimony on future dangerousness of the defendant when the opinion is based on questioning conducted without a prior warning on the Fifth Amendment privilege and without opportunity for advice of counsel. The psychiatrist who interviewed Muniz did so at the direction of the prosecutor and without notice to the attorney for Muniz. No *Miranda* warning was given Muniz, nor was he told that the responses to the doctor's questions might be used against him on issues governing his punishment. The psychiatrist then used that interview as the basis for his opinion, to which he testified at the punishment phase of the trial, that Muniz would probably commit criminal acts of violence that would constitute a continuing threat to society. There is no question but that, under *Estelle v. Smith,* there were Fifth and Sixth Amendment violations. The legal argument occurs because the *Estelle v. Smith* decisions, from trial court to Supreme Court, came after the trial of Muniz and because there was no objection raised at the trial by counsel for Muniz.

II.

The federal district court denied the writ because of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) and *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 [3] L.Ed.2d 783 (1982), holding that by Texas law there had been a waiver of these claims by the failure to object to the testimony. The Texas Court of Criminal Appeals had disposed of this claim, raised by Muniz on direct appeal, by saying that any error was waived by the failure to object. When the Texas court denied habeas corpus in 1979, it no doubt held the same view of the law and the case. So it is true that the Texas court has denied relief to Muniz on the ground of procedural waiver. However, that decision came, on both direct appeal and collateral attack, prior to *Estelle v. Smith* when, as the Texas Court of Criminal Appeals stated in its footnote, there was no error to be objected to under Texas law. 573 S.W.2d 795 n.5. Under the well established Texas law in 1978 and 1979 the interview of the psychiatrist was held not to be testimonial or adversarial, thereby not implicating the Fifth or Sixth Amendments. *See, e.g., Armstrong v. State,* 502 S.W.2d 731, 734-35 (Tex. Crim. App. 1973); *Livingston v. State,* 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976). After *Estelle v. Smith* corrected these Texas holdings, the Texas Court of Criminal Appeals ruled that the failure to object at a trial conducted prior to the Supreme Court's decision constitutes no waiver of *Estelle v. Smith* violations. While there may have been some doubt on this point in the past, *see Green v. Estelle,* 712 F.2d 995 (5th Cir. 1983), the Texas court has recently repeated its retroactive application of *Estelle v. Smith* and has upheld a collateral attack despite the lack of an objection at trial, *Ex parte Chambers,* No. 69-260 [4] (Tex. Crim. App. Dec. 5, 1984).

Where the state court has rejected petitioner's claim on grounds of procedural waiver under an incorrect view of the underlying law and where the state now applies no waiver under the same circumstances, no consideration of comity would lead a federal court to bar the petitioner from presenting these claims. To deny to Muniz, a death-sentenced prisoner, the equal recourse against constitutional violations would be fundamentally unjust. *See Engle v. Isaac,* 456 U.S. at 135, 102 S.Ct. at 1576, 71 L.Ed. 2d 783 (1982).

III.

The State urges, however, that we should not give *Estelle v. Smith* retroactive application. Recognizing that this circuit has done so in *Battie v. Estelle,* 655 F.2d 692 (5th Cir. 1981), the State argues that the Supreme Court's writing in *Solem v. Stumes,* ..... U.S. ....., 104 S.Ct. 1338, ... L.Ed.2d ..... (1984), has changed the rules of retroactivity and thereby required a result different from *Battie.* In *Solem* the Supreme Court refused to give retroactive application to *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Texas contends that under the same rationale *Estelle v. Smith* would not be given retroactivity. This argument depends upon our regarding *Estelle v. Smith* as a new decision of constitutional law to the same effect of *Edwards.* While *Estelle v. Smith* may have been a new and clear break with the past in the view of Texas courts, we do [5] not think the Supreme Court so regarded it. The Court saw the psychiatric testimony on future dangerousness, without prior warning or advice of counsel, as violating clearly established constitutional law. It was a unanimous judgment, three of the justices saying that the 1964 case of *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d

246 (1964), decided the matter. While the Supreme Court in *Solem* did discuss necessary considerations, in giving retroactivity to a new and unforeshadowed holding, which we did not consider in *Battie*, neither do we need to reach them here in a case where, as we held in *Battie*, the holding has not established a new principle of constitutional law.

We must give effect here to *Estelle v. Smith*. Under that decision the Fifth and Sixth Amendments were violated at the punishment phase of Muniz's trial, and his death sentence cannot stand. The judgment of the district court denying the writ of habeas corpus is reversed. The case is remanded to that court with directions to grant relief in accordance with this opinion.

REVERSED AND REMANDED.

(Filed June 21, 1985)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1791

PEDRO CRUZ MUNIZ,
Petitioner-Appellant,

versus

RAYMOND K. PROCUNIER, Director of Texas Department of Corrections,
Respondent-Appellee.

Appeal From the United States District Court
for the Western District of Texas

ORDER:

IT IS ORDERED that the motion of appellee for recall and stay of the issuance of the mandate until such time as the United States Supreme Court renders its decision in *Chambers,* is DENIED.

IT IS FURTHER ORDERED that appellee's motion for leave to file petition for rehearing out of time is DENIED.

/s/ Thomas M. Reavley
United States Circuit Judge

STATEMENT OF PEDRO CRUZ MUNIZ

Respondent's three page statement is filed as State's Exhibit 97 and Defendant's Exhibit 3 in Respondent's state court trial records. The statement is as follows:

> I first seen this girl monday night walking by the brigde [sic] me and my brother and cousin were at my uncle alvin cruz lives by the jail house. I got off and followed her toward Sonic Drive inn. I remember her waring [sic] big dark coat and carring [sic] a small purse. I grab her and told to come with me. She said where. I said don't worry about that. Then she said O.K. We walked arcoss [sic] the river and went up on side of hill. I stretched the fence she went across. I then cross so went to the shed and we had intercourse. I can't really remember but the way it must have been the [sic] I knock her uncoious [sic] and drag her body down by the fence next to the fence and then throw some logs on her and then I left.
>
> I left the body went back arcoss [sic] the dam. Went up to the ridge and I seen Herbert Jackson, Larry Drake, Gilbert Gonzalez and I asked them to give a ride home. I told them I had a fight and I needed a ride to Jarrell and would pay for gas. And then they took stright [sic] home My wife asked me what happened. I told her I had a fight. Then I change clothes. Then I put my pants under the sink in the bathroom. I had put my shirt in my bedroom on my little girl bed. Then I change clothes then I told my sister in law to take me to Georgetown so they would think had a fight. We road around for a while then I told her to take me back home. My wife was with us when we road around. And we saw my friends who gave me a ride home.

My wife doesn't know nothing about this. I love my wife and my kids and my unborn child and I want to be with very much. I don't know what made me do this terrible thing, but I was high. I had been drinking and smoking weed with a pill that I had ate. I know what I did to that girl was wrong and not God's will. I wish that the people who said that they had seen me would had stop and done something about it nothing like this would had happen. I am very sorry for what happen. I wish I had the power to bring that girl back to life and I hope God will have mercy on me. I will never drink or smoke or do drugs again in my life. So help me Jeuse [sic] Christ. If there is any I can change what I did wrong and make it right again I will do it.

BEVERLY HILLS CLINIC

1353 N. Westmoreland Ave. ● P.O. Box 21046
Phone 331-8331
Dallas, Texas 75211

PSYCHIATRY

Jackson H. Speegle, M.D.
Fred H. Jordan, M.D.
Joseph H. Lindsay, M.D.
John T. Holbrook, M.D.

PSYCHOLOGY

George R. Mount, Ph.D.
Donald L. Whaley, Ph.D.
Tom I. Payton, M.S.
Patrick R. Barnes, M.S.

June 17, 1977

Mr. Edward Walsh, District Attorney
Williamson County
County Courthouse
Georgetown, Texas 78626

Re: Pete Muniz

Dear Mr. Walsh:

As per your request I saw on March 7, 1977, Pete Muniz, in the Williamson County Jail for the purpose of psychiatric examination and evaluation.

Mr. Muniz, who states his age as 20 years, entered into the examination with me freely and openly. He indicates that he understands he has been charged for the offense of rape and murder and states he has one misdemeanor charge for resisting arrest. He states he has not been convicted of a felony resulting in serving correctional time. He says he has been in jail since December 23, 1976. The Birth and Early Development History is contributory only in that he states that he was present when a murder was committed, though, he says he did not personally see this occur. Educationally, he has a 10th grade education, but says that

he only performed in school when he felt like it and that he quit school in the 10th grade. The Work History indicates that he started working at age 16 and has a spotty work history with no goal orientation involved. The Marital History indicates his wife is hard-working and is a secretary. There is a history of frequent separation in the marriage related to his immature behavior such as getting upset with his wife because she asked him to take her out or his becoming angry and abusive when the children would cry and this would make him "mad". There is no Military History and the Medical History indicates he has broken his own right hand during a temper fit in a beer joint. There is no history of attempted suicide because he says, "I love myself". He has never seen a psychiatrist or been to a mental hospital. There is no history of neuromuscular disease. The Toxic History indicates that he has used marijuana and he claims to drink up [2] to the point where he is "still in control". He states that he had not done any medication or "dope" on the day of the offense and claims to have had only three or four beers during the day of the offense. He disclaims being addicted to any drugs in the past. The Mental Status indicates he is oriented as to time, place and person, is not suffering from any major mental illness and shows lack of imagination and creativity along with impulsive answers. His general information is poor relative to what appears to be good comprehensive ability. In a subjective Q & A session with him, he complains that the jail personel try to aggravate him by "messing with the TV". His attitude toward his incarceration is inappropriate for the seriousness of his present circumstance. There is no indication of remorse or guilt relative to the offense.

Impression: Antisocial personality

It is my opinion this man was sane at the time of the offense and was sane at the time of the examination. He is, in my view, competent to aid his attorneys in his defense.

Sincerely,

/s/ John T. Holbrook
John T. Holbrook, M.D.

JTH/ab

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

A-79-CA-198

PEDRO CRUZ MUNIZ,
Petitioner,

vs.

W.J. ESTELLE,
Respondent.

JUDGMENT

In accordance with the Memorandum and Order being entered contemporaneously herewith;

It is ORDERED, ADJUDGED, and DECREED that petitioner's application for a writ of habeas corpus be DENIED.

SIGNED this 27th day of July, 1984.

/s/ H.F. Garcia
H.F. Garcia
United States District Judge

(Filed July 30, 1984)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

A-79-CA-198

PEDRO CRUZ MUNIZ,
Petitioner,

vs.

W.J. ESTELLE,
Respondent.

MEMORANDUM AND ORDER

On December 20, 1976, Janis Carol Bickham, a 19 year old second year student at Southwestern University in Georgetown, Texas, was raped and murdered by petitioner Pedro Cruz Muniz. He was indicted for capital murder, found guilty and sentenced to death. After exhausting available state remedies (*Muniz v. State,* 573 S.W.2d 792 (Tex.Crim.App. 1978)), he filed this application for a writ of habeas corpus pursuant to Title 28 U.S.C. Section 2254. The matter was referred to United States Magistrate Philip Sanders pursuant to Title 28 U.S.C. Section 636(b)(1)(B) and Rule 1(e) of Appendix C to the Local Court Rules of the United States District Court for the Western District of Texas, for his review and recommendation. Petitioner has raised several grounds of error. The Magistrate entered his findings in September, 1983

recommending that the points of error be overruled except for point number one concerning the admission of psychiatric testimony at the punishment phase of petitioner's trial. Petitioner objected to the adverse determinations by Magistrate Sanders. This Court has reviewed the state court records, the [2] petition in this lawsuit, the transcript of the evidentiary hearing held herein, the Magistrate's recommendations and the petitioner's objections, in making a de novo determination of those portions of the report to which objection was made. *See, Garcia v. Boldin,* 691 F.2d 1172, 1179-80 (5th Cir. 1982). The recommendations will be accepted in part and rejected in part. The findings that points of error two through seven were without merit are accepted without the need for further discussion. The recommendation that petitioner's application be granted because of the admission of the psychiatric testimony will be rejected for the reasons stated below.

Introduction

Petitioner contends that the introduction of the testimony of Dr. John Holbrook at the punishment phase of the trial violated his privilege against self-incrimination, his right to due process of the law, and his right to the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the United States Supreme Court granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of the capital murder trial of respondent Smith to establish his future dangerousness violated his constitutional rights. The Supreme Court held that the Fifth Amendment is implicated and violated by the failure to provide a defendant with *Miranda* warnings prior to the psychiatric

interview which forms the basis of the opinion testimony of future dangerousness [3] given at the penalty phase of the trial. Additionally, the Sixth Amendment right to the assistance of counsel is abridged when a defendant is not given the opportunity to consult with counsel prior to his participation in the psychiatric examination. Although the due process issue was not discussed by the Supreme Court, the Court of Appeals in *Smith* held that the prosecution's surprise use of a psychiatrist as a witness denies a defendant due process in that his attorney is prevented from effectively challenging the psychiatric testimony. 602 F.2d 694, 698-99 (5th Cir. 1979).

Contemporaneous Objection

The facts of petitioner's case are in many respects, the same as in *Smith*. At the request of the trial court in *Smith* and the prosecutor in this case, each defendant while in custody was examined prior to trial by a psychiatrist, presumably to determine competency and sanity although the defendants never raised these issues. At the time of each examination, each defendant was represented by counsel who had not been notified of the impending psychiatric interview. In neither case were *Miranda* warnings given to the defendant. The State does not attempt to distinguish the cases but does argue that petitioner's failure to contemporaneously object to the testimony precludes the raising of the issue now, citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This Court agrees that the objections have been waived.

In *Smith*, the Supreme Court, for the reasons stated by the Court of Appeals in its opinion, rejected the State's [4] argument that respondent Smith waived his Fifth Amendment claim by failing to make a timely, specific objection to the psychiatric testimony at trial. 101 S.Ct. at

1876, n. 12. For three reasons, the Court of Appeals held that the Fifth and Sixth Amendment claims were not forfeited by respondent Smith's failure to object at trial. 602 F.2d at 708, n.19. The first reason given was the State's waiver of the contemporaneous objection argument by its failure to raise it until the motion for new trial was filed in federal district court. In this case, the State timely raised this contention in its motion to dismiss filed in November, 1980. The second reason was the apparent futility of objecting because of the position of Texas courts that the admission of such psychiatric testimony would not violate the Fifth or Sixth Amendment. In *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), the Supreme Court noted that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial.

> ". . . If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*. 102 S.Ct. at 1572-73.

Isaac was merely a corollary to *Sykes* and did not create new law. [5] In any event, judicial decisions are generally applied retroactively. *Solem v. Stumes*, ... U.S. ....., 104 S.Ct. 1338, 1341 (1984). Applying the criteria used to determine retroactivity in criminal cases, the Court believes *Isaac* would be so applied and was the law at the time of petitioner's trial. *See*, ibid. Therefore, any assertion that

futility is cause for petitioner's failure to object is without merit.

The third reason cited by the Court of Appeals was the surprise element of the testimony. In the affidavit attached to petitioner's motion for summary judgment, petitioner's counsel testified that he was not informed of the psychiatric evaluation until shortly before Dr. Holbrook testified. He also states that the psychiatrist's name was not on the prosecution's witness list. The record indicates that petitioner, through an amended motion for discovery, filed in February, 1977, sought disclosure of any psychiatrist's report, suggesting knowledge of the evaluation or at least the possibility of one. (TR. Vol. IV, p. 36) This request was granted by the trial court on June 1, 1977 (TR. Vol. IV, p. 76), and petitioner's counsel did in fact receive Dr. Holbrook's report dated June 17, 1977. Regarding the list of witnesses, the record reflects that, at a hearing on April 29, 1977 concerning discovery of witnesses, petitioner's attorney stated he was not asking for the names of witnesses to be used at the punishment phase. (SF p. 433). The objections raised to Dr. Holbrook's testimony concerned relevance, speculation and conjecture, not surprise as in *Smith*. The claim of surprise was not raised in the trial court; it was not raised in the [6] appellant's brief (filed May 19, 1978) in the Texas Court of Criminal Appeals; it was not raised in the supplemental brief (filed September 8, 1978) even though the federal district court opinion in *Smith*, which discussed the surprise element as a denial of due process, was cited; and it was not raised in the motion for rehearing filed in November, 1978. The claim that the petitioner's counsel was denied the opportunity to effectively prepare for Dr. Holbrook's testimony was raised for the first time in the petition for writ of habeas corpus in state court in August,

1979, over two years after the trial. These facts are strong evidence of the lack of surprise in this case.

The cross-examination of Dr. Holbrook by petitioner's counsel is not consistent with surprise or lack of preparation. He inquired about the connection between hypoglycemia and the commission of rape, and whether petitioner was suicidal. He asked about the meaning of petitioner's statement "I love myself." Dr. Holbrook was questioned about his familiarity with the writings of Eric Fromm and Dr. Maslo, and their concepts of a self-actualizing person as being one who loves himself. Counsel attempted to impeach Dr. Holbrook concerning the number of times he has testified in criminal cases, in particular capital murder cases. He asked about diagnoses in similar cases and whether he, Dr. Holbrook, had consulted with other physicians regarding petitioner or his family. He inquired as to psychological tests administered to petitioner, and whether Dr. Holbrook evaluated his "cognitive domain" and his "effective domain." Finally, counsel asked if Dr. Holbrook considered petitioner's economic, [7] educational, and racial make-up in his analysis, and whether other psychiatrists could draw a different conclusion. This questioning is not indicative of surprise or of the lack of effective preparation that would constitute a denial of due process. Surprise cannot, in this case, constitute a cause sufficient to excuse the failure to object to Dr. Holbrook's testimony on constitutional grounds.

Before the contemporaneous objection rule can be applied, it must appear that the state courts did or would utilize the failure to object as a procedural bar. *See, Preston v. Maggio,* 705 F.2d 113, 115 (5th Cir. 1983). In *Green v. Estelle,* 712 F.2d 995 (5th Cir. 1983), the Court of Appeals held that under Texas law, a habeas corpus petitioner's claims of violations of Fifth and Sixth Amendment

rights in the admission of psychiatric testimony in the penalty stage are not barred by the failure to object at trial. Despite the panel's belief that Texas courts would not apply the procedural bar, the en banc Texas Court of Criminal Appeals in *Parker v. State*, 649 S.W.2d 46 (Tex. Crim.App. 1983), *cert. denied*, 104 S.Ct. 496 held that absent a timely objection on the basis of the Fifth and Sixth Amendments, a defendant is barred from asserting on review of his conviction that the admission of testimony concerning an examination by the State's psychiatrist was obtained in violation of the defendant's privilege against self-incrimination and his right to counsel. The panel in *Green* decided, however, that the contemporaneous objection rule would not bar consideration of defects which were not of constitutional magnitude prior to trial. But [8] the Court of Criminal Appeals in *Parker* held that the Fifth and Sixth Amendment objections to the psychiatric testimony were waived by Parker's failure to object at his trial in April, 1977, prior to the *Smith* decision. The *Parker* Court considered each of the three reasons cited by the Court of Appeals in *Smith* which excused a contemporaneous objection. As in this case, the *Isaac* decision negating the futility argument was retroactively applied, the State timely raised the waiver issue, and no surprise was shown. This Court believes and holds that Texas courts would and do apply the contemporaneous objection rule to bar review of claims that the admission of psychiatric testimony violated a defendant's constitutional rights, even if this defect was not, as of the time of trial, considered to be of constitutional magnitude.

Although *Parker* was a noncapital crime case at which competency and sanity issues were raised, while *Green* was a death penalty case, this Court believes the result should be the same. In any event, the Texas Court of

Criminal Appeals found in petitioner Muniz' case that his failure to object to the psychiatric testimony at trial waived any error in its admission. 573 S.W.2d at 794-95. In view of the application of the procedural bar to petitioner in State court, the cause and the actual prejudice analysis can be made. As previously determined, he has not established cause for his failure to object. It is, therefore, the holding of this Court that petitioner Muniz, by failing to object to the testimony of Dr. Holbrook on the [9] constitutional grounds he now raises, has waived any defect in the admission of that evidence.

Harmless Error

Regardless, however, of the disposition of the contemporaneous objection issue, the *admission* of Dr. Holbrook's testimony at petitioner's trial was harmless error. Although there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, all trial errors which violate the Constitution do not automatically call for reversal. *Chapman v. State of California,* 386 U.S. 18, 87 S.Ct. 824, 827-28, 17 L.Ed.2d 705 (1967). The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Ibid.* Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Ibid.* In *White v. Estelle,* 720 F.2d 415 (5th Cir. 1983), the Court of Appeals held that the admission of psychiatric testimony in the penalty phase of a capital case, in violation of the defendant's constitutional rights, cannot constitute harmless error. This Court believes, however, that a distinction must be made, in determining harmless error, between violations of constitutional rights which themselves influence a trial and

the admission of evidence obtained in violation of constitutional rights.

The assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California, supra,* 87 [10] S.Ct. at 827. Reversal is automatic if a defendant is denied his right of self-representation, if a conflict in joint representation exists (*Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)), or if a defendant is actually denied the assistance of counsel (*Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). None of those situations exists here. Petitioner's Fifth and Sixth Amendment rights were violated prior to trial at the psychiatric examination; it was only the *admission* of the psychiatric evidence which could have affected his trial.

The error in the admission of evidence obtained in violation of the Fifth and Sixth Amendments can be harmless beyond a reasonable doubt if, for instance, the jury, in addition to hearing the challenged testimony, is presented with overwhelming evidence against the defendant. *Milton v. Wainwright,* 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) (confession admitted at guilt/innocence phase). *See, also, United States v. Ledezma-Hernandez,* 729 F.2d 310, 313 (5th Cir. 1984) (admission of statements obtained in violation of Fifth Amendment). *Hall v. State of Iowa,* 705 F.2d 283, 290-91 (8th Cir. 1983), *cert. denied,* 104 S.Ct. 339. *United States v. Ackerman,* 704 F.2d 1344, 1349 (5th Cir. 1983) (admission of statements obtained in violation of *Miranda*). *Tarpley v. Estelle,* 703 F.2d 157, 162 (5th Cir. 1983). *United States v. Hayles,* 471 F.2d 788, 793 (5th Cir. 1973), *cert. denied,* 411 U.S. 969 (admission of evidence obtained in violation of Sixth Amendment). In *Vanderbilt v. State,* 629 S.W.2d 709 (Tex.

Crim.App. 1981), the [11] Texas Court of Criminal Appeals, in affirming the death sentence of the defendant, applied the harmless error rule to the pre-*Smith* admission of psychiatric testimony. In *Sanne v. State,* 609 S.W.2d 762, 774 (Tex.Crim.App. 1980), the erroneous admission of testimony as to future dangerousness was held to be harmless error in light of the abundance of other evidence demonstrating the defendant's antisocial personality.

The error in this type of case is not a denial of counsel but is essentially one of ineffective assistance of counsel. *See, Smith v. Estelle,* 445 F.Supp. 647, 661 (N.D. Tex. 1977). With or without counsel at the psychiatric examination, there is no error until the results are received in evidence at trial. No one could seriously contend that had the evidence not been admitted, that the constitutional violations occurring at the time of the examination could form the basis of reversal of a conviction. The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *United States v. Cronic,* ..... U.S. ....., 104 S.Ct. 2039, 2046 (1984). Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. *Ibid.* Ineffective assistance of counsel is not reversible error unless a defendant establishes that his counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington,* ..... U.S. ....., 104 S.Ct. 2052, 2064 (1984). The conclusion that must be drawn is that the constitutional errors which exist here do not [12] necessarily mandate reversal, and can be harmless; whether they are will be discussed below. The denial of petitioner's Fifth and Sixth Amendment rights at the psychiatric examination cannot automatically render admission of the results at trial reversible error.

Article 37.071 of the Texas Code of Criminal Procedure establishes the procedure to be followed after a finding of guilty in a capital case. Two or, if raised by the evidence, three questions are submitted to the jury. The first question asks whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. The third question, which has no relevance in this case, applies if the killing of the deceased was in response to provocation. The second question requires the jury to determine whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. That issue of future dangerousness is the one to which the psychiatric testimony is relevant.

Introduction of expert psychiatric or psychological testimony is not a prerequisite for a jury finding of yes on special issue no. 2. *Bravo v. State,* 627 S.W.2d 152, 159 (Tex.Crim.App. 1982). It is well established that the circumstances of the offense itself can sustain an affirmative answer to the second special issue, if they are severe enough. *Mitchell v. State,* 650 S.W.2d 801, 812 (Tex.Crim. App. 1983). The jury, at the penalty stage of the trial, may consider all of the [13] evidence adduced at the guilt stage. *Ibid.* In fact, the circumstances of the offense and the facts surrounding it may furnish greater probative evidence than any other evidence regarding the second special issue submitted at the penalty stage of a capital murder case. *Ibid.*

In addition to the facts of this particular case, which will be discussed below, testimony was heard from several witnesses that petitioner's reputation in his community for being a peaceful and law-abiding citizen was bad. There was also evidence admitted proving that petitioner pled

guilty to the offenses of escape and resisting arrest in September, 1976. While examining the facts, it should be noted that petitioner does not contest his guilt of the crime.

On Monday, December 20, 1976, petitioner, his brother and his cousin began drinking around noon. Petitioner had also taken a "pill" and smoked marijuana. After dark, they drove to the house of the cousin's uncle on Austin Avenue near the bridge over the San Gabriel River. The brother and the cousin went inside the house and when they returned, petitioner was gone. He had seen Janis Carol Bickham walk by and followed her over the bridge. He grabbed her and forced her to the bathhouse of an abandoned swimming pool where he raped her on the concrete floor. According to his confession, he "knock[ed] her [unconscious] and drag[ged] her body down by the fence." He dragged her 75 yards [14] across the ground through weeds, brush and limbs; the autopsy revealed multiple scrape and drag marks on the front and back of her body. When the body was found two days later it was covered with driftwood, trash, leaves and sticks.

The pathologist who performed the autopsy testified that Ms. Bickham's body had defense-type bruises on the top side of each hand and forearm. Petitioner had bruises as well as scratches on his arms, side and face. He also had scuff and scrape marks on his knee, and his hand was swollen. Blood was splattered around the body. The disturbed area indicated a violent struggle.

The autopsy revealed that Ms. Bickham's hymen was lacerated and that sperm was present in her vagina. Injuries in the genital area indicate resistance. She had four blunt lacerations in her scalp; both upper and lower eyelids were swollen and discolored, and the whites of her

eyes were bloody. She had a blunt laceration between her eyes on her forehead. Bruises were present behind each ear, and her lower jaw was fractured and displaced. There were a total of nine impact points. The type of weapon petitioner used to beat Ms. Bickham's head is not known. Internal examination revealed swelling of her brain, and multiple bruises on both sides of her brain. The cause of death was determined to be a fractured skull in association with forcible rape. The photographs taken at the crime scene and during the autopsy were admitted into evidence.

This Court has not recited all of the aggravating factors which the jury heard and considered. But it is very apparent [15] that the evidence proving petitioner's future dangerousness was overwhelming. This included evidence of his bad reputation as a peaceful and law abiding citizen, as was presented in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), his violent criminal conduct at other times, and the circumstances and facts of this heinous crime. It should be noted that the only evidence at the penalty phase of the *Smith* case was the psychiatrist's testimony. *See*, 445 F.Supp. at 654. It should also be noted that in arriving at his opinion in this case Dr. Holbrook was asked to consider not only his interview with petitioner, but the facts of this case. Had he expressed an opinion based solely on those facts and his past research in other cases, no constitutional violation would have occurred. *See, Vanderbilt v. State, supra*, at 720-21.

All of these circumstances lead this Court to believe that the admission of the testimony of Dr. Holbrook was harmless error. The rape and murder committed by petitioner were not the only violent crimes he had committed. The jury knew about his convictions for escape and resisting arrest and they also knew about his bad reputation

in the community as a peaceful and law-abiding citizen. The rape and murder committed by petitioner was vicious and gruesome, and alone suffices to justify a finding of future dangerousness. The jury heard the testimony of witnesses, including those who found Ms. Bickham's body and performed the autopsy, heard the petitioner's confession, and saw the photographs. The Court concludes that there is no reasonable possibility that the admission of Dr. Holbrook's testimony might [16] have contributed to the conviction. The constitutional error is harmless beyond a reasonable doubt.

Conclusion

In summary, the Court finds that petitioner was deprived of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel at the psychiatric interview by Dr. Holbrook; the admission into evidence of his testimony based upon this interview was error. Petitioner has waived any objection to the error by failing to contemporaneously object at the time of trial. Assuming the error was not waived, it was harmless beyond a reasonable doubt. The *Smith* case, while establishing a new, valuable principle of law, was not intended to automatically require reversal of every death penalty case in which psychiatric testimony was erroneously admitted. Had the Supreme Court intended that result, it certainly would have so held. The standard for review of a death penalty case is the same as in all criminal cases. *See, Bass v. Estelle*, 696 F.2d 1154, 1157 n.2 (5th Cir. 1983). All cases, including those with *Smith*-type errors, should be weighed on their own facts considering all the pertinent circumstances. Analysis of this case in this way leads this Court to the conclusions stated above.

While this Court is convinced of the propriety of its decision, the appellate court may be of a different view. The [17] State is reminded, no doubt unnecessarily, that reversal of a death penalty case for an error in the punishment phase necessitates retrial of the guilt/innocence phase as well. Any error with respect to the trial court's admission of psychiatric testimony obtained in violation of *Smith*, no longer exists if the death penalty is commuted to life imprisonment, the least punishment petitioner could receive after having been convicted of capital murder. *See, Ex parte English*, 642 S.W.2d 482 (Tex.Crim.App. 1982), *Wilder v. State*, 623 S.W.2d 650 (Tex.Crim.App. 1981). The decision is up to the Governor of the State of Texas.

It is, therefore, ORDERED that petitioner's application for writ of habeas corpus be, and it hereby is, DENIED.

SIGNED this 27th day of July, 1984.

/s/ H.F. Garcia
H.F. Garcia
United States District Judge

EDITOR'S NOTE

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NO. 85-151

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Supreme Court, U.S.
FILED
SEP 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

LANE McCOTTER, Director,
Texas Department of Corrections,

Petitioner,

- against -

PEDRO CRUZ MUNIZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JESSE ROY BOTELLO
515 South Main Avenue
San Antonio, Texas 78204
[512] 225-5346

ATTORNEY FOR RESPONDENT

NO. 85-151

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LANE McCOTTER, Director,
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RESPONDENT'S BRIEF IN OPPOSITION

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515 South Main Avenue
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[512] 225-5346

ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the Williamson County District Attorney's claim that a 1981 decision of this Court should now be declared non-retroactive presents any colorable issue warranting the grant of certiorari.

2. Whether this Court should hear a harmless error claim which (i) was conceded in respondent's favor by the prosecution before the Fifth Circuit and accordingly was not addressed in that Court's opinion, and (ii) has been rejected by both the Texas Court of Criminal Appeals and the Fifth Circuit in every case in which it has been addressed.

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Petitioner,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A.

The Court of Appeals below made the following findings, which the district attorney has not challenged in his certiorari petition:

> The psychiatrist [Dr. John Holbrook] who interviewed Muniz did so at the direction of the prosecutor and without notice to the attorney for Muniz. No Miranda warning was given Muniz, nor was he told that the responses to the doctor's questions might be used against him on issues governing his punishment. The psychiatrist then used that interview as the basis for his opinion, to which he testified at the punishment phase of the trial, that Muniz would probably commit criminal acts of violence that would constitute a continuing threat to society. There is no question but

> that, under Estelle v. Smith, [451 U.S. 454 (1981),] there were Fifth and Sixth Amendment violations.

Certiorari Petition at A-2; 760 F.2d 588, 589 (5th Cir. 1985).

Dr. Holbrook was the prosecutor's only expert witness at the penalty phase. The district attorney also introduced evidence of Mr. Muniz's prior criminal record, which consisted solely of two misdemeanor offenses (SF 5132, 5134).[1/] The defense called four relatives and friends: Richard Deloy, Fernando Mechano, Maria Muniz and Christina Muniz (SF Vol. 24). They testified that respondent was a good husband and father who was affectionate towards his wife and three children, treated his family well, and kept his family well clothed and fed by working as a cabinet maker (SF 5194, 5195, 5210, 5215-16).

The jury at the penalty phase ultimately returned to the courtroom without having answered Texas Special Sentencing Issue No. 2, which requires a finding as to whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Art. 37.071(b)(2). The trial judge, over defense counsel's objection, then instructed the jurors to continue their deliberations and "see if you can arrive at an answer to Special Issue No. 2" (SF 5255, 5263). Subsequently, the jury requested additional instruction as to the appropriate definition of the word "probability" as used in the special issue (SF 5266). Finally, after nearly six hours of deliberation, the jury returned with an affirmative answer to Special Issue No. 2 and respondent was sentenced to death (SF 5268).

1/ Numbers preceded by "SF" refer to pages of the Statement of Facts (transcript) before the Texas Court of Criminal Appeals.

B.

On federal habeas corpus the State was represented in the district court and the Fifth Circuit by the Texas Attorney General. The State initially argued that Mr. Muniz had waived error under Estelle v. Smith, 451 U.S. 454 (1981), by failing to interpose an adequate objection at trial. However, while the appeal was pending, the Texas Court of Criminal Appeals decided Ex Parte Chambers, 688 S.W.2d 483 (Tex. Cr. App. 1984), in which it adhered to several prior decisions holding as a matter of Texas state law that failure to object at trials conducted prior to Smith does not constitute procedural default.[2/] The State then filed a Supplemental Brief in which it raised for the first time the claim that this Court's 1981 Smith holding should be declared non-retroactive. In that Supplemental Brief the State also conceded that the Smith error in this case was not harmless, stating:

> Respondent cannot, in good faith, assert that there is no reasonable possibility that Dr. Holbrook's testimony contributed to the jury's answering of the second special issue in the affirmative.

Supplemental Brief of Respondent-Appellee in Muniz v. Procunier, No. 84-1791 (5th Cir.), p. 28 (annexed hereto as Appendix A). In light of this concession, the Fifth Circuit did not address the subject of harmless error in its opinion.

On May 9, 1985, the Texas Attorney General advised the local prosecutor that his office would not seek certiorari in this case. However, on June 21, 1985 the Attorney General agreed to allow the local prosecutor to be substituted as counsel for the State in order to seek certiorari. See Motion for Substitution As Counsel of Record in the court below (annexed hereto as Appendix B).

2/ See 688 S.W.2d at 484; id. at 485-86 (concurring opinion joined by a majority of the Court). See also Green v. Estelle, 712 F.2d 995 (5th Cir. 1983), discussing several earlier Texas cases on this point.

REASONS FOR DENYING THE WRIT

I. RETROACTIVITY

The district attorney's retroactivity argument presents no colorable issue warranting certiorari, for at least three separate reasons.

A. The decision of the Fifth Circuit is fully consistent with earlier decisions of that court holding Estelle v. Smith, 451 U.S. 454 (1981), retroactive. It is also consistent with the position of the Texas Court of Criminal Appeals, which "has given retroactive application to ... Smith." Ex parte Chambers, supra, 688 S.W.2d at 484. The leading Fifth Circuit opinion, Battie v. Estelle, 655 F.2d 692, 696-99 (5th Cir. 1981), remains as unimpeachable today under Solem v. Stumes, ___ U.S. ___, 79 L.Ed. 2d 579 (1984), as under prior decisions of this Court.

Although the Texas courts had repeatedly ignored the Miranda implications of prosecutors' tactics involving Doctors Grigson and Holbrook prior to 1981, the unconstitutionality of these tactics was never seriously in doubt by the federal judiciary. Smith, the first Texas capital case presenting the issue to reach a federal court, sailed through the federal system without a single judge or Justice voting for the State's position. Habeas corpus relief was granted by the district court, 445 F.Supp. 647 (N.D. Tex. 1977); a unanimous panel of the Fifth Circuit affirmed, 602 F.2d 694 (5th Cir. 1979); rehearing en banc was denied without any request for a poll, let alone any dissent, 606 F.2d 321 (5th Cir. 1979); and this Court unanimously affirmed, 451 U.S. 454 (1981).

B. To be sure, only six Justices were willing to decide Smith on Fifth Amendment grounds; Justices Stewart, Powell and Rehnquist did not wish to reach that question. But the Court was unanimous on the Sixth Amendment basis for its decision, with all three opinions stating that the result was a simple and obvious applica-

tion of Massiah v. United States, 377 U.S. 201 (1964). See Estelle v. Smith, supra, 451 U.S. at 469-71; id. at 474 (concurring opinion of Justice Stewart, joined by Justice Powell); id. at 474-75 (concurring opinion of Justice Rehnquist). For such a decision to be declared non-retroactive is inconceivable.

Any contention that Smith was not "'clearly' or 'distinctly' foreshadowed" by prior law within the meaning of Solem v. Stumes, supra, 79 L.Ed. 2d at 591, misconceives both decisions. In Stumes the holding of Edwards v. Arizona, 451 U.S. 477 (1981), was held to have "establish[ed] a new rule" (79 L.Ed. 2d at 589), not clearly foreseeable, because it innovated "a per se approach" (ibid.) after this Court "had several times refused to adopt per se rules governing the waiver of Miranda rights" (id. at 590). The Court's Sixth Amendment decision in Smith involved no similar innovation departing from a course of previous precedent. It simply applied Massiah, according to Massiah's plain language and unmistakable purport, in a factual setting where the application of the Massiah rule was clear. After Hoffa v. United States, 385 U.S. 293 (1966), and Kirby v. Illinois, 406 U.S. 682 (1972), it was hornbook law that the fact of indictment alone triggered a criminal defendant's Sixth Amendment right to counsel in any confrontation with state-instigated agents. Massiah himself had been confronted not with a police interrogator but with an undercover agent; Massiah was not in custody at the time of the confrontation, but at large on bail. The application of Massiah to an indicted defendant questioned in custody by a psychiatrist acting as an agent of the prosecutor is simply a fortiori. To claim that it was not clearly and distinctly foreshadowed by Massiah is disingenuous.[3/]

3/ The fact that the Texas Court of Criminal Appeals blindly refused to obey this basic principle of constitutional law for many years with respect to the activities of Doctors John Holbrook and James P. Grigson, e.g., Gholson v. State, 542 S.W.2d 395, 400 (Tex. Cr. App. 1976), hardly triggers retroactivity analysis.

As the Court of Appeals below observed:

> While Estelle v. Smith may have been a new and clear break with the past in the view of Texas courts, we do not think the Supreme Court so regarded it. The Court saw the psychiatric testimony on future dangerousness, without prior warning or advice of counsel, as violating clearly established constitutional law. It was a unanimous judgment, three [opinions] of the Justices saying that the 1964 case of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), decided the matter. [Smith did not] ... establish[ ] a new principle of constitutional law.

Certiorari Petition at A. 4-5; 760 F.2d 590 (5th Cir. 1985).

C. Finally, it is important to note that rejection of the prosecutor's retroactivity argument will have no significant "disruptive effect on the administration of Justice" in Texas, Solem v. Stumes, supra, 79 L.Ed.2d at 591. In the more than four years since Smith was decided and held retroactive in Battie, virtually every Texas death row inmate with a Smith claim has already been granted relief.[4/] According to the records of the NAACP Legal Defense Fund, at least nineteen have had their death sentences vacated by state or federal courts on the basis of Smith, and at least seven more have had their sentences commuted by the Governor at the prosecution's request in advance of court decisions. (See Appendix C, infra.)[5/] We are aware of only one Smith case decided by the Fifth Circuit pursuant to this case, Jones v. Procunier, 767 F.2d 101 (5th Cir. 1985), and two more pending in

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4/ The Texas Attorney General did not seek certiorari in Battie.

5/ The Governor of Texas commuted over 30 death sentences in the wake of Smith and Adams v. Texas, 448 U.S. 38 (1980). It is quite possible that many more than seven involved Smith issues. The Legal Defense Fund's list is conservatively limited to cases in which opinions or court papers on file at the Fund conclusively establish the presence of a Smith claim.

There may be other Texas death cases in which psychiatrists testified for the prosecution at the penalty phase hypothetically (i.e., without examining the defendant), or at the guilt trial in response to an insanity defense, or at a competency trial in response to a claim of incompetence, or for some other purpose. These cases, of course, are not covered by Smith, and are unaffected by the claim advanced in the certiorari petition. See Barefoot v. Estelle, 463 U.S. ___, 77 L.Ed.2d 1090 (1983); Estelle v. Smith, supra, 451 U.S. at 465-66 & n.10.

the federal district court for the Eastern District of Texas, plus Ex Parte Chambers, supra. To the best of counsel's knowledge, just about every death sentence that could be vacated under Smith has been vacated already.[6/] And if the State has any information to the contrary, it certainly has not said so: in neither this case nor Chambers have the prosecutors identified from their records a single pending case which would be affected by declaring Smith non-retroactive at this late date.[7/] The impact of denying certiorari is virtually nil.

II. HARMLESS ERROR

A. This Court has a long-standing policy of declining to hear issues which were "not raised in the Court of Appeals and ... not addressed by that court." Rogers v. Lodge, 458 U.S. 613, 628 n. 10 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). See Stern & Gressman, Supreme Court Practice 457 (5th Ed. 1978) and cases cited therein.

In this case the harmless error claim was not merely "not raised" in the Fifth Circuit. It was expressly conceded in Mr. Muniz's favor by the Attorney General of the State of Texas. See

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6/ It is highly unlikely that there might be a few still pending in the Texas Court of Criminal Appeals. Texas prosecutors were on notice as to the nature of Smith error, and were therefore able to avoid committing it, at least after the Fifth Circuit's Smith decision in 1979 (if not after the District Court's decision in 1977). For a capital appeal to be pending in the Texas Court of Criminal Appeals six years after trial is exceedingly rare. Thus, it is hard to imagine that any capital case still pending in the Texas courts is old enough to contain Smith error.

7/ The Texas Attorney General's Office, which has a better statewide overview of capital cases pending on collateral review than any individual district attorney, has declined to seek certiorari on this issue. See p. 3, supra and Appendix B.

p. 3, supra and Appendix A. And in light of the Attorney General's concession, the issue was not addressed in the opinion below. Leaving aside the question of whether the local district attorney is now bound by the Attorney General's concession (much as new counsel for a habeas petitioner is normally bound by the waivers, concessions and procedural defaults of prior counsel), it is hard to imagine an issue more procedurally unsuitable for review by this Court.

B. Substantively also, the issue is unworthy of certiorari. The harmless-error question raised by the petition is completely fact-bound. Petitioner asks this Court to review the entire trial record, assess the weight and quality of the evidence on both sides, and decide whether Dr. Holbrook's testimony was, in this context, more or less likely to have affected the outcome. No principle of general applicability can emerge from this inquiry, and petitioner does not suggest any way in which the Court's undertaking of the inquiry would clarify or develop the constitutional law of harmless error or any other legal doctrine. If there was ever an issue of importance to no one but the parties in a particular case, this is it.

To consider such an issue is not, of course, the office of the certiorari jurisdiction. All that petitioner wants this Court to do is to pore over the transcript of an individual case in order to make a routine application of settled harmless-error analysis. The Court has ample opportunity to illustrate such applications every Term, when it decides cases raising important substantive questions which warrant its attention.

C. The decision below conforms in approach and result to every other reported decision considering whether Smith errors have been harmless on the facts of particular cases. In White v. Estelle, 720 F.2d 415 (5th Cir. 1983), the Fifth Circuit expressly rejected the

prosecution's claim that a Smith error was harmless. The Court held:

> We cannot conclude that evidence admitted on a critical issue in the sentencing phase of a capital case, in violation of White's constitutional rights, constituted harmless error beyond a reasonable doubt.

720 F.2d at 418. Similarly, in Green v. Estelle, 706 F.2d 148 (5th Cir. 1983), rehearing denied with opinion, 712 F.2d 995 (5th Cir. 1983), the Court of Appeals granted Smith relief despite a strenuous harmless error argument by the Texas Attorney General.[8/] See also Battie v. Estelle, supra (State called eleven witnesses to testify concerning defendant's bad reputation and two more who recounted specific acts of violence made by him,[9/] yet introduction of psychologist's testimony in violation of Smith was not deemed harmless).

The Texas decisions are in the same vein. See Clark v. State, 627 S.W.2d 693, 697-98 (Tex. Cr. App. 1981). As the court observed in Clark:

> the issue we must confront is not whether the facts of the crime, standing alone, would support the finding [of probable future dangerousness], but whether the testimony of Coons [the prosecution's psychiatrist] might have contributed to the jury's verdict during the punishment phase. We conclude that there was a reasonable possibility that Coons' testimony might have contributed to the jury's verdict during the punishment phase of appellant's trial.

627 S.W.2d at 698. Indeed, under Texas law, the erroneous admission of far less damaging and central evidence at the penalty phase of a capital trial has been held prejudicial and reversible. See Cortez v. State, 571 S.W.2d 308 (Tex. Cr. App. 1978) (intro-

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8/ See Brief for Respondent in Green, No. 82-2324 (5th Cir.) at 30-34.

9/ Brief for Respondent in Battie, No. 79-1567 (5th Cir.), at 4; Second Supplemental Brief for Respondent in Battie at 2 (filed after Smith was decided).

duction of improperly authenticated 1954 and 1960 convictions for auto larceny was not harmless, even though the prosecution had established more recent convictions for more serious crimes and had also presented psychiatric testimony as to the defendant's probable future dangerousness).

The reasoning underlying the above-cited decisions is obvious and compelling. The expert testimony deemed inadmissable in Smith is not merely one more item of evidence to be weighed against other, properly admitted evidence, in reaching a harmless error determination. Such expert testimony speaks directly, and with the appearance of weighty scientific authority, to the very question of probable future dangerousness posed by Tex. Code Crim. Proc. Art. 37.071(b)(2). It does not simply provide the jury with evidence to apply in searching for an answer to the statutory sentencing question; instead it purports to answer the question itself, and as a matter of science no less. That is why Smith errors could not be deemed harmless beyond a reasonable doubt (Chapman v. California, 386 U.S. 18 (1967)) by the Fifth Circuit in White, Green and Battie, or by the Texas Court of Criminal Appeals in Clark.

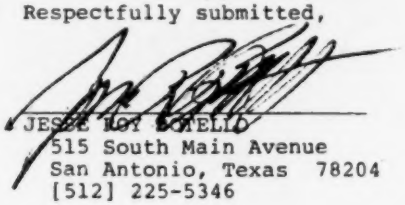
Assuming that there could be cases in which the other evidence of probable future dangerousness is so overwhelming as to render Smith error harmless, this is not such a case. As noted at p. 2, supra, respondent's entire prior criminal record consisted of only two misdemeanor convictions. He had strong family ties and a good work record. And the sentencing jury obviously had considerable difficulty reaching a verdict on the question of probable future dangerousness: it deadlocked at first and had to be admonished to resume deliberations and try again; even after resuming deliberations it requested further instruction on the meaning of the word

"probability" in Special Issue No. 2; and it did not arrive at a verdict until nearly six hours of deliberation had passed. Under these circumstances, the Texas Attorney General was quite correct in conceding below that the unconstitutional admission of Dr. Holbrook's testimony could not be deemed harmless error.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

APPENDIX A

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLEE

IN MUNIZ v. PROCUNIER, No. 84-1791 (5th Cir.), p. 28

Estelle. [9] This court rejected the "death is different" theme when it stated:

> In general response to the implicit suggestion, we note our disagreement with it. The various expressions of the Supreme Court quoted by Bass are not more than precatory ones, expressive of the sanctity with which all decent men view human life as endowed and the gravity with which they regard a decision--however measured it may be--to terminate it. Nor are these expressions novel or the sentiments which they avow newly-arisen; they go back to the Black Cap and beyond, stretching far into times when human life was shorter, more perilous, and less highly regarded than it is today. To be sure, they also refer to the many explicit safeguards that have now been enacted or decided to express these concerns. But to suggest that a different general mode of review is required by them is to demean the criminal law generally, to imply that we might somehow view lightly such questions as whether a life sentence or one for a lengthy term of years was arrived at properly. There is one system of criminal appellate review, applicable to all cases and to this one.

Id., at 1157 n.2.

Respondent would concede that the district court was incorrect in its conclusion that the admission of Dr. Holbrook's testimony constituted harmless error. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). Respondent cannot, in good faith, assert that there is no reasonable possibility that Dr. Holbrook's testimony contributed the the jury's answering of the second special issue in the affirmative. See White v. Estelle, 720 F.2d 415, 419 (5th Cir. 1983).

9/ See Brief for Petitioner Bass at pages 7-8, 16, 25-32, Bass v. Estelle, No. 82-2341.

APPENDIX B

MOTION FOR SUBSTITUTION AS COUNSEL OF RECORD

NO. 84-1791

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PEDRO CRUZ MUNIZ,

Petitioner-Appellant,

V.

LANE MCCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

On Appeal From the United States District Court
For the Western District of Texas
Austin Division

MOTION FOR SUBSTITUTION AS COUNSEL OF RECORD

KEN ANDERSON
DISTRICT ATTORNEY

MICHAEL PATRICK DAVIS
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ATTORNEYS FOR RESPONDENT-APPELLEE

NO. 84-1791

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PEDRO CRUZ MUNIZ,

Petitioner-Appellant,

V.

LANE MCCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

On Appeal From the United States District Court
For the Western District of Texas
Austin Division

MOTION FOR SUBSTITUTION AS COUNSEL OF RECORD

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES Lane McCotter, Director, Texas Department of Corrections, Respondent herein, and moves the court to enter an order appointing the District Attorney of Williamson County as Respondent's attorney of record in place of the Attorney General of Texas in the above-entitled cause and in support of such motion shows:

I.

On May 9, 1985, this court reversed the judgment of the district court denying a writ of habeas corpus and remanded the case to the district court with instructions to grant the writ. Mandate was issued by this court on the date of decision.

II.

On May 9, 1985, the Attorney General of the State of Texas informed the District Attorney of Williamson County that the attorney general's office would not file a petition for writ of certiorari in the United States Supreme Court. On June 21, 1985, the attorney general's office agreed to allow the District Attorney of Williamson County to be substituted as counsel of record to enable the district attorney to file a petition for writ of certiorari: (see letter attached as Exhibit A). The Attorney General of the State of Texas has also agreed to file a motion for withdraw as counsel of record.

III.

On July 25, 1985, a petition for writ of certiorari seeking review of this court's decision in No. 84-1791 was docketed in the United States Supreme Court as No. 85-151, entitled Lane McCotter, Director, Texas Department of Corrections v. Pedro Cruz Muniz.

WHEREFORE, PREMISES CONSIDERED, it is repsectfully requested that Respondent's Motion for Substitution as Counsel of Record be granted.

Respectfully submitted,

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EXHIBIT "A"

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 21, 1985

Mr. Ed Walsh
District Attorney
Williamson County Courthouse
Georgetown, Texas 78626

Re: Pedro Cruz Muniz v. Procunier, ___ F.2d ___
No. 84-1791 (May 9, 1985)

Dear Mr. Walsh:

By this letter, this office authorizes you to appear as counsel of record on behalf of Mr. Lane McCotter, who has succeeded Raymond Procunier as Director of the Texas Department of Corrections, to enable you to file a petition for writ of certiorari seeking review of the above-referenced decision.

If this office may be of any further assistance to you in this matter, please do not hesitate to call me.

Very truly yours,

F. Scott McConn

F. SCOTT McCONN
Assistant Attorney General
Chief, Enforcement Division
P. O. Box 12548, Capitol Station
Austin, Texas
(512) 457-3281

FSMc./rm

CERTIFICATE OF SERVICE

I, Michael Patrick Davis, Assistant District Attorney of Williamson County, do hereby certify that one true and correct typewritten copy of the above and foregoing Respondent's Motion for Appointment as Attorney of Record has been served by placing the same in the United States mail, certified, return receipt requested, on this the 13 day of August, 1985, addressed as follows: Mr. Jessie Roy Botello, 515 South Main Avenue, San Antonio, Texas 78204.

MICHAEL PATRICK DAVIS
ASSISTANT DISTRICT ATTORNEY

APPENDIX C

Texas Capital Cases Known to the NAACP Legal Defense and Educational Fund, Inc. Involving Estelle v. Smith Issues

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Texas Capital Cases Known to the NAACP Legal Defense and Educationa Fund, Inc. Involving Estelle v. Smith Issues

I. Fifth Circuit Cases

1. White v. Estelle, 720 F.2d 415 (5th Cir. 1983)
2. Green v. Estelle, 706 F.2d 148 (5th Cir. 1983)
3. Gholson v. Estelle, 675 F.2d 735 (5th Cir. 1982)
4. Ross v. Estelle, 675 F.2d 734 (5th Cir. 1982)
5. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)

II. District Court Cases

1. Bell v. Estelle, C.A. No. B-81-909 (E.D. Tex. Jan. 17, 1984)
2. Shippy v. Estelle, C.A. No. W-81-CA-081 (W.D. Tex. Oct. 24, 1983)
3. Von Byrd v. Estelle, No. B-79-760-CA (E.D. Tex. June 9, 1983)
4. Livingston v. Estelle, No. S-77-75-CA (E.D. Tex. Jan. 6, 1983)
5. Collins v. Estelle, C.A. No. W-78-CA-91 (W.D. Tex. Sept. 13, 1982)
6. Denney v. Estelle, C.A. No. B-80-161 (S.D. Tex. Feb. 4, 1982)
7. Ferguson v. Estelle, No. W-80-CA-50 (W.D. Tex. Jan. 12, 1982)

III. Texas Court of Criminal Appeals Cases

1. Mays v. State, 653 S.W.2d 30 (1983)
2. Ex Parte English, 642 S.W.2d 487 (1982)

3. Ex Parte Demouchette, 633 S.W.2d 879 (1982)

4. Fields v. State, 627 S.W.2d 714 (1982)

5. Clark v. State, 627 S.W.2d 693 (1981)

6. Brandon v. State, No. 59,348 (June 2, 1982)

7. Thompson State, 621 S.W.2d 624 (1981)

Commutations by the Governor prior to court decision in cases known to contain Smith issues

1. Jackie Osteen (June 17, 1981)

2. James Simmons (Aug. 17, 1981)

3. Magdaleno Rodriguez (Oct. 16, 1981)

4. William Hammett (Oct. 21, 1981)

5. Artie Armour (Oct. 21, 1981)

6. Doyle Boulware (Oct. 20, 1982)

7. Moses Garcia (March 22, 1983)